



Maryland

Department of Economic & Employment Development

William Donald Schaefer
Governor

J. Randall Evans
Secretary

Board of Appeals
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

1100 North Eutaw Street
Baltimore, Maryland 21201
Telephone: (301) 333-5032

— DECISION —

IN THE MATTER OF THE APPEAL OF:
Trahan Films, Inc.

Decision No.: 32 -EA-92
Date: August 12, 1992
Exec. Determ. No.: 7640
Employer Account No.:

ISSUE: Whether the services performed by certain individuals for Trahan Films constitute employment covered by the Unemployment Insurance Law, within the meaning of Section 8-205 of the Labor and Employment Article.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAYBE TAKEN IN PERSON OR THROUGH AN ATTORNEY, IN THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU DO BUSINESS.

THE PERIOD FOR FILING AN APPEAL TO COURT EXPIRES September 11, 1992

— APPEARANCES —

For the Appellant:

Thomas Trahan, President
Gregory Black, Esquire

For the Secretary:

John McGucken, Agency
Counsel

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing before the Special Examiner. The Board has also considered all the documentary evidence introduced in this case, as well as the Department of Economic and Employment Development's documents in the appeal file.

The Board of Appeals has also considered the legal argument presented at the hearing before the Board.

FINDINGS OF FACT

The Board of Appeals adopts as its findings of fact the first seven paragraphs of the Special Examiner's Findings of Fact, except that the control exercised by the employer was more than minimal.

In addition, the Board finds as a fact that the employer exercised some control over all the individuals in question in this case and that the services performed were not performed outside all of the places of business of Trahan Films. Since the business of the employer is the production of commercial advertising films, the studios and locations where the films are made are the places of business of this employer.

The services performed by all the individuals, including the employer's son, were performed for the corporation, Trahan Films, and not for Thomas Trahan.

CONCLUSIONS OF LAW

Section 8-205 states:

Work that an individual performs under any contract of hire is not covered employment if...:

(1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract;

(2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and

(3) the work is:

(i) outside of the usual course of business of the person for whom the work is performed; or

(ii) performed outside of any place of business of the person for whom the work is performed.

In order for an individual who performs a service to be considered an independent contractor under this provision of the law, and therefore not covered by the Unemployment Insurance Law, all three parts of the test must be met.

In this case, the Board concludes that none of the individuals in question meet all three requirements of Section 8-205. These individuals perform under the control and direction of

the employer, and do not perform the services outside either the usual course of business or outside the places of business of Trahan Films. Therefore, it is not necessary for the Board to reach the issue of whether they all are customarily engaged in an independent business or occupation of the same nature. They are all in covered employment for the purposes of the Unemployment Insurance Law.

The employer argued that the employer's son was under the age of 21 at the time the services in issue were performed and therefore should be exempt from coverage because of the family relationship. However, Section 8-215 states:

Employment is not covered if performed:

- (1) for a child or spouse; or
- (2) for a parent, by a child under the age of 21 years.

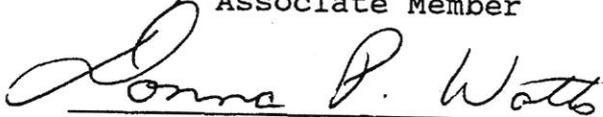
Since the services were performed for the corporation, Trahan Films, Inc. and not for Thomas Trahan personally, this exemption is not applicable.

DECISION

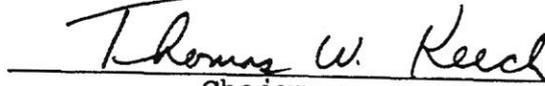
The services performed by the individuals listed in the attachment to this decision are considered covered employment, within the meaning of Section 8-205 of the Labor and Employment Article. The decision of the Special Examiner is modified.



Associate Member



Associate Member



Chairman

W:W:K

ubm

DATE OF HEARING: August 4, 1992

COPIES MAILED TO:

EMPLOYER

John McGucken - Legal Counsel, DEED

Jerry Placek -Room 407

Gregory Black. Esq.

Maryland

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT

1100 North Eutaw Street
Baltimore, Maryland 21201
(301) 333-5033

William Donald Schaefer, Governor
J. Randall Evans, Secretary

BOARD OF APPEALS

Thomas W. Keecn, Chairman
Hazel A. Warrick, Associate Member
Donna P. Watts, Associate Member

— DECISION —

IN THE MATTER OF THE APPEAL OF:
Trahan Films, Inc.

Decision No.: 36 -EA-91
Date: October 11, 1991
Determ. No.: 7640
Employer Account No.

ISSUE:

Whether the services of unionized professionals such as actors, cameramen, and other support personnel who work part-time or intermittently for Trahan Films constitutes covered employment under the Labor and Employment Article.

— NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER AND SUCH APPEAL MAY BE FILED IN ANY DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT OFFICE OR WITH THE BOARD OF APPEALS, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING AN APPEAL EXPIRES

October 27, 1991

— APPEARANCES —

For the Appellant:

For the Secretary:

Present for Hearing on March 1, 1991:
Thomas Trahan, President
Peter Berube, CPA

Jerry Placek, Review
Det. Unit Supervisor

Present for Hearing on June 4, 1991:
Thomas Trahan
Peter Berube

Jerry Placek

FINDINGS OF FACT

Thomas Trahan is president of the Maryland corporation, Trahan Films, Inc. The corporation has been in business five years, and their current business address is 8831 Satyr Hill Road, Baltimore, Maryland 21234. The employer produces commercial advertising films.

The employer is required to contract with predominantly union employees, Local 15, National Association of Broadcast Employees and Technicians (NABET). Occasionally, non-union members are employed to work on a production set.

Regarding union employees, the employer is required to pay an individualized wage minimum, per day, which is assigned per job classification. In addition, a \$43.00 payment, per union individual, per day, is paid to the union's pension and welfare fund.

The employer representative, Thomas Trahan, is the production's director. The Special Examiner finds that Thomas Trahan maintains a minimal amount of control over the union members employed on his set. Regarding actors, it is his function to obtain the best performance from each of them. Regarding the various technicians, the employer representative directs them into positions and requires that they function as part of "his team". However, individual skills and judgment must be exercised by each technician in order for their participation to complement the entire production.

Each union member associated with a particular production submits his/her individual invoice to the employer. Thomas Trahan approves each invoice, and he is required to issue payment within fourteen days. The employer maintains a separate business checking account for this purpose.

The employer owns no studio or filming equipment. He leases a studio, if necessary, or he works on location for the remainder of his filming.

The Special Examiner finds that none of the union employees can incur a monetary loss when working for the employer.

The hearing was continued until June 4, 1991 to allow the employer the opportunity to obtain additional evidence to support their position.

On June 4, 1991, the employer submitted numerous exhibits supporting their position that individuals listed in the agency's audit, who were affiliated with his production company for a one or two-day duration, were independent contractors and not his employees.

The Special Examiner finds that the employer was unable to produce any invoices, business cards, stationery or a Maryland Production Guide Listing on the following individuals listed in the audit: Todd Trahan, Frank DeMarco, Linda Jackson, John Ellsbury, Art Navman, Tom Taylor, Laura Cuppetilla, Caprice Erickson, Paul Thomas, Catherine Jarboe, Joan Oswald, Mary Fickett, Patricia Pidlavan, Dennis Meeks, Terrence Cummings and Dick Hackley.

The Special Examiner further finds that the agency representative has conceded that the service performed by the individuals listed in the agency audit was performed outside all of the places of business of Trahan Films, Inc.

CONCLUSIONS OF LAW

In order for services performed by the individuals listed in the agency audit to be exempt under the Labor and Employment Article, all three sections of the Labor and Employment Article, Title 8, Section 8-205(1)(2)(3) must be satisfied.

The agency has conceded that Trahan Films, Inc. has met the statutory requirement of Section 8-205(3).

Section 8-205(1) and Section 8-205(2) of the Labor and Employment Article state:

Work that an individual performs under any contract of hire is not covered employment if the Secretary is satisfied that:

- (1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract;
- (2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and
- (3) the work is: (i) outside of the usual course of business of the person for whom the work is performed; or (ii) performed outside of any place of business of the person for whom the work is performed.

Regarding all individuals listed in the agency's audit, the Special Examiner finds the employer's exercise of minimal control over these individuals meets the statutory requirement of Section 8-205(1) in that each individual has been and will continue to be free from control and direction over the performance of his services.

Regarding Section 8-205(2) of the Labor and Employment Article, the Special Examiner finds that the employer has met their burden of proof, with the exception of specific individuals listed below, pertaining to those individuals being customarily engaged in an independently established occupation or business of the same nature as that involved in the service in question.

Those individuals listed in the agency's audit in which the employer has failed to meet their burden of proof, within the meaning of Section 8-205(2), are: Todd Trahan, Frank DeMarco, Linda Jackson, John Ellsbury, Art Navman, Tom Taylor, Laura Cuppetilla, Caprice Erickson, Paul Thomas, Catherine Jarboe, Joan Oswald, Mary Fickett, Patricia Pidlavan, Dennis Meeks, Terrence Cummings, and Dick Hackley.

Therefore, the Special Examiner will find that services performed by these specific sixteen individuals, during the calendar year 1988, for Trahan Films, Inc., are within covered employment and their wages would have had to have been reported for Maryland Unemployment Insurance purposes.

Regarding the remaining individuals which have been listed in the agency's audit, the Special Examiner will find that their services performed for Trahan Films, Inc. fall within the statutory requirements of Section 8-205(1)(2)(3), and therefore, are not within covered employment.

The agency's Review Determination, #7640, will be modified accordingly.

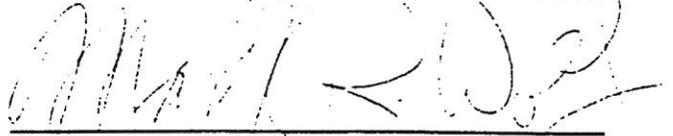
DECISION

Trahan Films, Inc. has not satisfied the statutory requirements of Section 8-205(2) of the Labor and Employment Article regarding services performed by: Todd Trahan, Frank DeMarco, Linda Jackson, John Ellsbury, Art Navman, Tom Taylor, Laura Cuppetilla, Caprice Erickson, Paul Thomas, Catherine Jarboe, Joan Oswald, Mary Fickett, Patricia Pidlavan, Dennis Meeks, Terrence Cummings, and Dick Hackley, during the calendar year 1988. These individuals' earnings, during the calendar year 1988, were in covered employment at this employer, and Trahan Films, Inc. would have been required to report such wages for Maryland Unemployment Insurance purposes.

Trahan Films, Inc. has satisfied the statutory requirements of Section 8-205(1)(2)(3) of the Labor and Employment Article regarding services performed by the remaining individuals

which have been listed in the agency's audit for the calendar year 1988. Therefore, these individuals' earnings, during the calendar year 1988, were not in covered employment at this employer. Trahan Films, Inc. would not have been required to report such wages for Maryland Unemployment Insurance purposes.

Therefore, the agency's Review Determination #7640 is modified accordingly.



Mark R. Wolf
Special Examiner

MRW: kbm

Hearing dates: March 1, 1991 & June 4, 1991

COPIES MAILED TO:

EMPLOYER

Jerry Placek - Room 407

John T. McGucken - Legal Counsel, D.E.E.D.